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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 158.

HENRY F. IGLEHART AND MARY I. POLK,
APPELLANTS,

vs.

J. HOWARD IGLEHART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANNIE E. I. ANDREWS, DECEASED, APPELLEE.

Brief for the Appellee and for the Greenwood Cemetery.

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Statement of the Case.

Annie E. I. Iglehart, a resident of the District of Columbia, died April 21, 1903, unmarried, and without issue, possessed of personal property and real estate situated in the District of Columbia, and leaving a will. This will was admitted to probate and letters testamentary issued. The executor filed a bill for the construction of the will. The heirs at law and next of kin contend that clauses 1, 10, and 12 are invalid. This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming the decree below declaring the will valid.

The appellants in this court are two of the heirs at law and next of kin who were parties defendant to the

bill filed by the executor for the construction of the will, an order having been passed allowing them to sever from their codefendants, and to prosecute this appeal.

The case was heard below upon the pleadings and an agreed statement of facts (Rec., p. 14).

Three paragraphs of the will are involved in this cause, the remainder of the will consisting of specific bequests to relatives and friends, about which there is no controversy. The will is set out in full on pages 5 and 6 of the record. The three paragraphs in dispute are as follows:

> "First. I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M street northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them, provided they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition."
>
> "Tenth. It is my will, and I order and direct that five thousand dollars be raised out of my estate to be expended in erecting a suitable monument at the grave of my dearly beloved husband, E. L. Andrews, in Greenwood Cemetery, Brooklyn, New York."
>
> "Twelfth. It is my will, and I order and direct that all the rest and residue of my estate, real,

personal and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause 1 of this my last will, for the purpose and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery lot in perpetual good order and condition."

Appellants' Assignments of Error.

The court below erred:

1. In sustaining the validity of the devise of real estate to the Greenwood Cemetery Company.

2. In upholding the residuary bequest to the Greenwood Cemetery Company.

3. In directing the erection of the monument provided for in paragraph ten.

ARGUMENT.

I.

Under the statutes in force in the District of Columbia and in the State of New York, and under the general doctrine of comity obtaining among the States, clauses ONE and TWELVE of the will are valid.

Even assuming that, *under the common law*, clauses one and twelve would create perpetuities, yet so far as the case at bar is concerned, this has been changed by statute. The appellants' extended argument on the subject of perpetuities and the cases cited thereon, which declare bequests and devises in trust for the care, etc.,

of burial lots invalid, have no bearing whatever on the present case. This is made clear by reading the law in force in the District of Columbia and the law in force in the State of New York.

The law of the District of Columbia permits cemetery associations incorporated under its laws to take real and personal property under trusts for the care, etc., of lots. It reads as follows:

> "Sec. 669. Grants and Bequests for Care of Lots.—It shall be lawful for such association to take and hold any grant, donation or bequest, upon trust to apply the income thereof, under the direction of the board of managers, for the embellishment, preservation, renewal or repair of any tomb, monument, gravestone or other structure, fence, railing or other inclosure in or around any cemetery lot, or for the planting and cultivation of any trees, shrubs, flowers, or plants in or around any cemetery lot, according to the terms of such grant, donation or bequest; and the Supreme Court of the District of Columbia shall have full power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose."
>
> D. C. Code, chap. XVIII, sub-chap. VI (Cemetery Associations), sec. 669.

The law of the State of New York permits the Greenwood Cemetery to take real and personal property under similar trusts. It is as follows:

> "Sec. 6. The said corporation may take and hold any grant, donation, or bequest of property upon trust to apply the same or the income thereof, under the direction of the board of trustees, for the improvement or embellishment of the said cemetery, or for the erection, repair, preservation, or renewal of any tomb, monument, or gravestone, fence, railing, or other erection, or for the planting and cultivation of trees, shrubs,

flowers, or plants in or around any cemetery lot, or for improving the said premises in any other manner or form consistent with the design and purpose of this act, according to the terms of such grant, donation, or bequest."

An act to alter and amend "An act to incorporate the Greenwood Cemetery," chap. 156, Laws 1839, State of New York, passed April 11, 1839.

Under the general law of comity obtaining among the States, the Greenwood Cemetery can take the property, whether real or personal, provided by the will.

Christian Union *vs.* Yount, 101 U. S., was a suit brought by Yount and others to set aside a conveyance of land in Illinois, executed in 1870, by Stephen Griffith, a citizen of Illinois, to the Christian Union, a corporation created in 1861 under the laws of New York, providing for incorporation of benevolent, charitable, and other societies in the latter State. Under the Illinois law corporations could be formed for purposes similar to those formed under the New York law. The Circuit Court rendered a decree against the Christian Union. The decree of the Circuit Court was reversed. The following extracts from the opinion are exactly in point:

"In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court. . . . We can not presume that it is now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a

benevolent or missionary corporation of another State of the Union when that State permitted its own corporations, organized for like purposes, to take real estate within its limits by purchase, gift, devise, or in any other manner."

Christian Union *vs.* Yount, 101 U. S., 352, 356, 359, 360.

Cowell *vs.* Springs Co., 100 U. S., involved the right of a Pennsylvania corporation to acquire land in Colorado. There was no provision of law under which a similar corporation could be formed under the laws of Colorado, then a Territory. The court said:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold and transfer property there equally with individuals. If the policy of the law does not permit the business of the foreign corporation within its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it can not be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law."

Cowell *vs.* Springs Co., 100 U. S., 55.

In McDonogh's Executors *vs.* Murdoch, 15 How., the testator was a resident of Louisiana and the estate situated there. The entire estate was left in trust, the income to be equally divided between the cities of Baltimore and New Orleans. The will specifically provided that the estate be invested in real property. One of the

principal questions was the right of the city of Baltimore to take. On this point the court says:

> "This court, in the case of The Bank of Augusta *vs.* Earle, 13 Pet., 520, said 'that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union.' This comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.
>
> "These principles were applied to a purchase of lands by the corporation of one State in another (Runyan *vs.* Coster, 14 Pet., 122).
>
> "The principles of these cases have been adopted in Louisiana. 4 Rob. La., 517; 17 La., 46, 312.
>
> "We know of no departure from these principles in Maryland, and do not doubt that the corporations of Louisiana would take in the same manner as those of Maryland in that State."
>
> McDonogh's Executors *vs.* Murdoch, 15 How., 367.

> "The act or contract must not be contrary to the laws of the State. Accordingly, if those laws forbid devises to corporations a devise to foreign corporations is invalid, although by its constitution it may be authorized to take in that manner. . . . But this public policy must be clear and positive."
>
> Taylor on Corporations (3d ed.), sec. 387–388.

> "According to the prevailing American doctrine, in the absence of local legislation to the contrary, of which legislation there are few traces, a testator may devise lands situated in one State

to a corporation existing in another State, provided its charter gives it power to do so."

Thompson on Corporations, vol. 6, sec. 7919.

See, also—

Bank of Augusta *vs.* Earle, 13 Pet., 520.

Runyan *vs.* Coster, 14 Pet., 122.

The Baptist Association *vs.* Smith, 3 Pet., 486, 500.

The Eastern Trust and Banking Co. *vs.* Willis, 6 App. D. C., 375.

Wilson *vs.* Perry, 29 W. Va., 169.

University *vs.* Tucker, 31 W. Va., 621.

American Bible Society *vs.* Marshall, 15 Ohio St., 537.

Santa Clara Female Society *vs.* Sullivan, 116 Ill., 375.

Thompson *vs.* Waters, 25 Mich., 215.

Thompson *vs.* Swope, 24 Pa. St., 474.

Boyce *vs.* St. Louis, 29 Bar. (N. Y.), 650.

Sherwood *vs.* American Bible Society, 4 Abb. App. Dec. (N. Y.), 227.

Many other cases, both in the Federal and State courts, could be cited to sustain this contention on behalf of the Greenwood Cemetery under the doctrine of comity, but citations have been, for the present, confined only to those cases involving the acquisition of *real estate* by foreign corporations by devise or purchase. Under this head the appellants, in argument below, cited only two cases which seem to take a contrary view. They are Carroll *vs.* East St. Louis, 67 Ill., 568, and Starkweather *vs.* American Bible Society, 72 Ill., 50. These cases have been much criticised, both in the opinion in Christian Union *vs.* Yount, 101 U. S., 352, which was an appeal from the United States Circuit Court for the Southern District

of Illinois; and also in the Illinois courts in Female Society *vs.* Sullivan, 116 Ill., 375. For a discussion of the Illinois cases see Thompson on Corporations, vol. 6, sec. 7914, note.

As will be seen by reference to the New York cases collected on pages 20 et seq. of this brief, a cemetery association organized under the laws of the District of Columbia and operating within the District of Columbia, could, under a will like the one in question, made by a resident of New York, take real estate situated in New York. Assuming that the Greenwood Cemetery takes the real estate as real estate, and even assuming that a perpetuity in real estate located in the District of Columbia is created by the will, the case of Christian Union *vs.* Yount, 101 U. S., 352, and other cases cited above, control, and the Greenwood Cemetery can take. As was said by the Court of Appeals in the case at bar:

> "The rule of comity permitting a foreign corporation to acquire and hold lands by devise is now generally recognized, provided their charters permit them so to do, and no prohibition is found in the laws or public policy of the domestic State (Am. & Eng. Encly. Law, vol. 13, page 856, 2d ed.). The public policy of the District of Columbia permits, in express terms, as shown by express legislation, its cemetery corporations to receive such bequests. The State of New York permits the Greenwood Cemetery Company to hold such bequests as the one in question. It seems to us that it follows, from the general law of comity prevailing among the various States of the Union, that we should recognize and uphold the right of this appellee to receive the bequests provided by the will. While there is some conflict in the decisions of the courts of the various States, we think that the decisions of the United States Supreme Court, which are controlling upon us, favor this doctrine of comity (Christian *vs.* Yount, 101 U. S., 352). In the light of the decision in that case, it can

not be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and administer such bequests."

Iglehart *vs.* Iglehart, 26 App. D. C., 209 (Rec., p. 22).

And Anderson, J., in the equity court below:

"As was said by the United States Supreme Court in the case of Christian Union *vs.* Yount, 101 U. S., 360, it is not to be presumed to be against the public policy of the State for one of its citizens to convey property to a corporation of another State for the purpose of enabling it to carry out the objects of its creation, when that State permits its own corporations, organized for like purposes, to take and hold property within its limits."

Iglehart *vs.* Iglehart (Rec., p. 16).

II.

The Greenwood Cemetery Takes the Interest in the Real Estate as Personal Property, and Takes a Vested Interest as Legatee, Under the Doctrine of Equitable Conversion.

The clauses of the will under which it takes are as follows:

"First. I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M street, northwest, in the city of Washington, District of Columbia, to be held by them

in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them, provided they shall keep the said property in repair and pay the taxes thereon. *At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold,* and the proceeds of such sale shall be invested in United States securities, the interest or income from said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition."

"Twelfth. It is my will and I order and direct that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, *shall be converted into cash, and said cash invested in United States securities,* the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, *in addition to and together with the trust fund hereinbefore mentioned in clause one of this my last will,* for the purpose and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery lot in perpetual good order and condition."

While it is contended that under the decisions referred to in Part I of this brief, the Greenwood Cemetery could be the beneficiary under a will devising real estate in the District of Columbia in trust for any purpose allowed by the cemetery's charter, still the entire estate so far as the cemetery is concerned is *personal property.* Therefore no perpetuity in real estate in the District of Columbia is attempted to be created by the will.

Where real estate is directed by will to be converted into money, it is in equity regarded as money, although

it was not to be sold until after the termination of two life estates.

Cropley *vs.* Cooper, 19 Wall., 167.
Peter *vs.* Beverly, 10 Pet., 532.
Craig *vs.* Leslie, 3 Wheat., 563.
Given *vs.* Hilton, 95 U. S., 591.
Holcomb *vs.* Wright, 5 App. D. C., 76.

"It follows, therefore, that every person claiming property under a will or settlement directing its conversion must take it in the character which such instrument has impressed upon it; and its subsequent devolution will be governed by the rules applicable to property of this character."

Jarman on Wills, vol. 1, 6th ed., star page 548.

"If a direction to sell land, however, is absolute, it is no exception to the rule that land directed to be sold and turned into money is to be treated as money from the death of the testator, for all the purposes of the will, that the time of the sale is remote, and the conversion in fact can not be made until the time arrives."

Jarman on Wills, vol. 1, chap. 19, 6th ed., note 3, page 578.

See, also—

Allen *vs.* Watts, 98 Ala., 384.
Rumsey *vs.* Durham, 5 Ind., 71.
Reiff *vs.* Strite, 54 Md., 298.
Thommans Estate, 161 Pa. St., 444.
Ropp *vs.* Minor, 33 Gratt. (Va.), 97.
Ford *vs.* Ford, 70 Wis., 19.
Lent *vs.* Howard, 89 N. Y., 169, 177.

In the present case there can be no doubt that the whole of the property given by the will to the Greenwood Cemetery is *personal property*, and that the trusts do

not infringe the rule against perpetuities in the District of Columbia. As was stated by the Court of Appeals, the law of comity should be recognized even more broadly in the District of Columbia than elsewhere in cases like the one under consideration.

> "But the position of the appellee is, we think, much stronger, for we have treated the property devised by the first clause of the will as real property. It appears that the will expressly directs that the real estate shall be sold upon the death of the life tenants, and perhaps sooner. The proceeds are to be invested in personal property. The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personality from the death of the testator (Hope *vs.* Brewer, 136 N. Y., 126; Reiff & Brinkley *vs.* Strite, 54 Md., 298). It is unnecessary to multiply authorities upon this point. The real estate being once converted into personality, it matters even less than in the case of real estate, to the District of Columbia whether such property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses. The District of Columbia, and its residents, are more interested in having the right of foreign cemetery companies to take property, real and personal, situate in the District, for the purpose of the care of cemetery lots, and the maintenance and care of monuments erected thereon, recognized, than other States or their residents can be, for the reason that so many of the people domiciled in the District come from other localities, or are the descendants of those who came from such localities, and, while passing their lives here, expect upon death to be laid in cemeteries located outside the District and which are not incorporated under its laws. In considering the policy of the laws of the District we think this fact should not be lost sight of, and in interpreting its laws we must bear in mind that they

> are enacted by Congress, which represents all sections of our common country. The law of comity should, therefore, be recognized even more broadly here than elsewhere, in all questions like the one under consideration."
>
> Iglehart *vs.* Iglehart, 26 App. D. C., 209 (Rec., p. 23).

And Anderson J., in the Equity Court below:

> "So far as the real estate itself is concerned, the trust can by no means infringe the rule against perpetuities, because the will expressly directs that the land shall be sold upon the death of the life tenant at all events, and perhaps sooner, thus bringing the devise within a life or lives in being and twenty-one years thereafter."
>
> Iglehart *vs.* Iglehart (Rec., p. 16).

Under this head, the only case seemingly in point cited by the appellants in the court below, is that of Hartson *vs.* Elden, 50 N. J. Eq., 521. The testator, a citizen of New Jersey, made two bequests, one a legacy to Oak Hill Cemetery, a New Jersey corporation, the other to Buxton Cemetery, a foreign corporation. An act similar to section 669 of the District of Columbia Code was passed in New Jersey two years *after* the death of the testator. The court held that the act in question had no retroactive effect, and that the bequests were void as creating perpetuities. What is said in the opinion in comment on the force of the act as to foreign corporations is *obiter*. There was no appearance for the Buxton Cemetery Company. The court does not seem to have considered any of the decisions quoted above and no cases in point were cited in the opinion. The court said:

> "In the next place, turning to the Oak Hill Cemetery Company, it appears, while the proofs show that company to be within the class of

cemetery companies contemplated in the Act of 1878, that the will considered took effect at the death of the testator, in September 1875, more than two years before the enactment of 1878, and hence, the question arises whether vested rights intervene before the passage of that law, which the law can not effect. . . . Under the rule, then, the legacies of the trust funds should have vested, if at all, at the death of the testator. Now at that time both legacies were void under the rule against perpetuities, and the property which otherwise would have been devoted to their payment immediately vested, according to its kind, in the heirs at law or next of kin of the testator."

Hartson *vs.* Elden, 50 N. J. Eq., 522, 527-8.

III.

Where the Testator Directs a Fund to be Transmitted to Another Jurisdiction and there Applied to a Trust, the Courts of the Testator's Domicile will Uphold the Bequest when the Trust is Lawful in the Jurisdiction where it is to be Performed, Even Though it Could Not be Enforced in the Jurisdiction of Testator's Domicile.

As a general proposition it can not be denied that as to the general capacity of the testator and as to the formal validity of a will, the law of the domicile of the testator governs. This is laid down broadly in the case of Jones *vs.* Habersham, 107 U. S., 174, 178, and the cases in the Supreme Court of the United States therein cited, as well as in other cases in both the Federal and State courts. An analysis of these cases, however, will disclose the fact that in no one of them did the question before the court turn upon the validity of a bequest of personal property, which property, by the terms of the

will, *was intended to be transmitted to and remain within a foreign jurisdiction*, but that in said cases the intention of the testator was that the fund should remain within the domicile of the testator, and consequently no question of conflict of laws could arise. In fact, in none of these cases is any reference whatever made to the line of cases decided in many of the Federal and State courts and by the English courts, where the point at issue turned on *the transmission of the fund to another jurisdiction.*

While it is not considered necessary to bring the case at bar within the doctrine laid down in the cases cited under this head, because it is contended that, whether considering the property involved as real estate or as personal property, this case comes absolutely within the doctrine of comity as presented in sections I and II of this brief, yet the cases now referred to fully sustain the contention that, even assuming that the bequests contained in the will, if made to a legatee domiciled within the District of Columbia, would be invalid, still, the Greenwood Cemetery could take.

The latest case bearing on this subject (Mount *vs.* Tuttle, 2 Lawyers' Rep. An., N. S., p. 428) was decided by the New York Court of Appeals on January 9, 1906, the opinion being rendered by the chief justice and concurred in by all the judges. It was held that the validity of a bequest to a trustee resident in another State will be determined by the laws of the latter State. The subject note (on Conflict of Law as to Wills), which is appended to this case, is very elaborate and exhaustive, and collects the authorities. The author says:

> "The general principles which refer wills of personal property to the law of the testator's domicile, and wills of real property to the law of the place where the property is situated, are frequently stated by the courts in very broad and

comprehensive terms, which are calculated to convey the impression that every question that may arise in respect of a will of personal property is necessarily and under all circumstances to be determined solely by the law of the testator's domicile; and that every question in respect of a will of real property is likewise to be determined by the law of the place where the property is situated" (p. 409).

"These general statements, though doubtless sufficiently accurate for the immediate purposes of the cases in which they were made, are not to be accepted without qualification and limitation. As will subsequently be shown in this note, while very many of the questions that relate to wills of personal property are to be referred to the lex domicilii, and most of those that relate to real property are to be referred to the lex rei sitæ, yet, even upon general principles of private international law, the law of the domicile, or of the situs, as the case may be, not infrequently yields wholly or partially to the law of another jurisdiction" (p. 410).

"The general statement referred to in supra, I., that wills of personality are governed by the law of the testator's last domicile, is not without many important exceptions as applied to the essential validity, as distinguished from the formal validity of the will. Indeed, it was declared generally in Chamberlain *vs.* Chamberlain, 43 N. Y., 424, that if, within the lex domicilii, a will has all the forms and requisites to pass the title to personality, the validity of particular bequests will depend upon the law of the domicile of the legatee, and of the government to which the fund is, by the terms of the will, to be transmitted for administration and the particular purposes indicated by the testator" (p. 430).

"The purpose of the rule against perpetuities and the suspension of the power of alienation is not primarily to limit the testator's capacity, but to prevent the indefinite withdrawal of property

from the channels of commerce; and, in general, it may be said that the purpose is local, and limited to property that is within the jurisdiction, or may remain therein conformably to the will. Hence, a gift of personal property, or of real property equitably converted into personality, upon a trust to be administered in a foreign country, by the law of which it is valid, will not be held invalid, even by the courts of the testator's domicile, though it contravenes the law of that domicile against perpetuities or the suspension of the absolute ownership of property" (p. 433).

Mount *vs.* Tuttle, 2 Lawyers' Rep. An., N. S., pp. 409, 410, 430, 433.

That the above statements lay down the law correctly is made clear by a long line of cases both in the Federal and in the State courts.

Federal courts:

"The law of the testator's domicile controls as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator and the construction of the instrument (Story Conflict Laws, 8th ed., sec. 479ab; Crusoe *vs.* Butler, 36 Miss., 150; Chamberlain *vs.* Chamberlain, 43 N. Y., 431). Movable property has no locality, and therefore the law of the domicile of the owner governs its transmission either by last will or testament or by succession in the case of intestacy (Story Conflict Laws, 8th ed., sec. 481; Jones *vs.* Habersham, 107 U. S., 179, 2 Sup. Ct., 336; Howes *vs.* Remsen, 4 Johns. Ch., 460). Although, within the law of the domicile a will has all the forms and requisites to pass title to movable property, nevertheless, if the will contains a particular bequest to be transmitted to and administered for particular purposes in another State, the validity of such particular bequest must be tested by the law of the

State to which the fund is by the terms of the will to be transmitted and administered (Chamberlain *vs.* Chamberlain, supra)."

Sickles *vs.* New Orleans, 26 C. C. A., 204, 52 U. S. App., 147, 80 Fed., 868 (1897).

State courts:

"But if within the lex domicilii a will has all the forms and requisites to pass title to personalty the validity of particular bequests will depend upon the law of the domicile of the legatee and of the Government to which the fund is by the terms of the will to be transmitted for administration and the particular purposes indicated by the testator. . . . If the legatee whether a natural or artificial person and whether he takes in his own right or in trust is capable by the law of his domicile to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained, irrespective of the law of the testator's domicile, subject, however, to this qualification, that if the law of the testator's domicile in terms forbids bequests for any particular purpose or in any way limits the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void anywhere. But so far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation and the suspension of ownership and the power of alienation, each State is sovereign as to all property within its territory, whether real or personal.

"It is not part of the policy of the State of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each State determines these matters according to its own views of policy and right, and no other State

has any interest in the question; and there is no reason why the courts of this State should follow the funds bequeathed to the Centenary Fund Society of Pennsylvania to see whether they will be there administered in all respects in strict harmony with our policy and our laws. . . ."

Chamberlain *vs.* Chamberlain, 43 N. Y., 424.

"It seems quite clear that the bequest by the testator to the trustees or officers of the Hazlewood Cemetery, under the laws of the State of New Jersey, is a good and valid bequest, and the case of Chamberlain *vs.* Chamberlain, 43 N. Y., 424, is an authority for the position that it is the duty of this court to direct the money so bequeathed to be paid over to the trustees of the cemetery, leaving it, if there be any question in the case, to the courts of that State to provide for the administration of the trust. The recent decision of Mr. Justice Ingraham, in the case of Hope *vs.* Brewer, reported in 15 N. Y. Supp., 849, in which the cases are examined bearing upon this subject is an authority supporting the conclusion which I have reached, even if it be conceded that such a bequest, under the laws of this State, would be invalid. That concession I am not prepared to make, inasmuch as by the laws of this State (chap. 139, Laws 1881) it is provided that every corporation which shall, under authority of law, hold, occupy and use lands for a cemetery and burial place, may receive by gift or bequest any moneys or personal property for the improvement and maintenance of such cemetery, or for the maintenance, repair, preservation or ornamentation of any private plat, vault, monument, tomb, or other structure in such cemetery, according to the terms of such gift or bequest."

Doty *vs.* Hendrix, 16 N. Y. Supp., 284, 285.

"The will of the testator, so far as the courts of this State can act upon it, is fully executed, when the money is paid to the proper officer of

the foreign corporation; and there is no law of this State prohibiting gifts to such foreign corporation. *Though the laws of the State of that corporation may permit it to hold and administer property in perpetuity, the local policy of this State upon that subject is not interfered with, by allowing the property of our citizens to pass to such foreign corporations,* and be administered by it in such foreign state according to its own laws (Fordyce *vs.* Bridges, 10 Beavan, 105; S. C.. 2 Phillips, 497; Vansant *vs.* Roberts, 3 Maryl., 119; Chamberlain *vs.* Chamberlain, post 424)."

Manice *vs.* Manice, 43 N. Y., 303, 388.

A residuary bequest of real and personal property (the real property being converted into personalty by the terms of the bequest) to Scotch trustees for a charitable purpose, to be carried out in Scotland, will not be held invalid by a court of New York, because it would contravene the law of New York, where the testator was domiciled, in that it unlawfully suspends the power of alienation, and is not sufficiently definite as to the beneficiaries, if the trustees are competent to take, and the trust is valid by the law of Scotland, and can be fully carried out in that country. The court said in this case: "When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: First, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, second, whether the foreign trustees are competent to take the gift for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect."

Hope *vs.* Brewer, 136 N. Y., 126, 18 L. R. A., 458, 32 N. E., 558.

"It is the policy of the law of this State to allow testators free power to provide for the disposition of personalty, which is to be sent to a foreign country, in accordance with the laws of that country. Such property as shall remain within the State of New York must be subject to the laws against perpetuities and forbidden trusts, for the laws of this State in that respect are designed to operate upon all property within its limits. They are founded upon public policy, which provides for proper power of disposition of property from person to person, without undue curtailment of the right of some one, within reasonable periods, to pass the title. But the object of the law is satisfied if the property is to be removed from the jurisdiction of the State. It leaves it to the courts of that other State the power to guide and control the execution of the trusts and the fulfillment of the wishes of the executor."

Kurzman *vs.* Lowy, 52 N. Y. Supp., 83.

When the New York cases are considered together, it is clear that, in order to bring a bequest of personalty within the New York statutes against perpetuties or the suspension of absolute ownership, the testator must not only have been domiciled in New York, but the will must also contemplate that the trust shall be administered there, or, at least, it must not provide for its administration elsewhere. This conclusion is expressly recognized in—

Dammert *vs.* Osborn, 140 N.Y., 30, 35 N. E., 407.

See, also, the following:

Despard *vs.* Churchill, 53 N. Y., 192.

In re Huss, 126 N. Y., 537.

Roosevelt *vs.* Porter, 36 Misc., 441; 73 N. Y. Supp., 800.

Congregational Society *vs.* Hale, 29 N. Y. App. Div., 396.

In re Sturgis, 48 N. Y. App. Div., 624.

Robb *vs.* Washington & J. College, 103 N. Y. App. Div., 327.

In re Lang's Will, 30 N. Y. Supp., 388, 393.

Kennedy *vs.* Palmer, 1 Thompson & C., 581.

Sherwood *vs.* American Bible Society, 1 Keyes, 561, 564.

Harris *vs.* American Bible Society, 4 Abb. Pr. N. S., 421.

Mapes *vs.* American Home Missionary Society, 33 Hun (N. Y.), 360.

There are two New York cases, Wood *vs.* Wood, 5 Paige, 596, and Bascom *vs.* Albertson, 34 N. Y., 587, opposed to the position taken in the cases above cited. These two cases have been overruled by the later decisions, being referred to in the opinion in Chamberlain *vs.* Chamberlain, 43 N. Y., 424. See, also, "Subject Note" in the Mount *vs.* Tuttle case, p. 435, where the author says:

> "It seems clear that this decision (Wood *vs.* Wood, 5 Paige) must be regarded as overruled by the latter cases above cited; and the case of Bascom *vs.* Albertson, 34 N. Y., 587, has been expressly overruled, so far as it conflicts with those cases."
>
> Mount *vs.* Tuttle, 2 Lawyers' Reports Annotated, N. S., p. 435 (1906).

And see—

2 Wharton on Conflict of Laws (3d ed.), p. 1322, note.

In Maryland there are four cases in point, the following extract from the first case illustrating the rule adopted:

> "The 34th section of the Bill of Rights of Maryland is analogous to the British Statute of Mortmain, and was designed to protect the people of

Maryland from the same evils, and so far therefore, as it refers to gift or devise of personal property, it can have no extra-territorial operation. It might be very important to the people of this State that a foreign corporation should not be permitted to hold large bodies of real estate within our limits, but we can not see why it should be a matter of concern to Maryland that the personal property of her citizens should not pass away to foreign corporations, any more than to individuals living abroad. Nor is it a matter of concern to our State in legal contemplation whether the property should accumulate in the hands of foreign corporations or not. These are questions to be regulated by each State for itself."

Vansant *vs.* Roberts, 3 Md., 119.
Brown *vs.* Thompkins, 49 Md., 423.
Church Extension M. E. Church *vs.* Smith, 56 Md., 362.
Stickney Will Case, 85 Md., 79, 106.

In Virginia it has been expressly decided that a bequest of personal property, under a Virginia will, to a foreign corporation, capable of taking under the laws of its domicile, is valid, although the bequest was invalid under the Virginia laws, and would not be upheld in favor of a Virginia corporation.

Roy *vs.* Rowzie, 25 Gratt., 599, 612.
Missionary Society M. E. Church *vs.* Mandeville, 32 Gratt., 357.
Trustees Presbyterian Church U. S. *vs.* Guthie et al., 86 Va., 125.

See, also, the following cases:
Wilson *vs.* Perry, 29 W. Va., 170.
Taylor *vs.* Bryn Mawr College, 34 N. J. Eq., 101.
Fowler's Appeal, 125 Pa. St., 388.
Sickles *vs.* New Orleans, 26 C. C. A., 204.

The same rule has been adopted by the English courts. In the case of Fordyce *vs.* Bridges, 2 Phillips, 497, one

of the questions before the court was the validity of a bequest of funds in trust directed by the will to be invested in Scotland in tail, and an examination of the case will disclose the fact that it was not in any way controlled by questions relating to charities or the rights of corporations operating under foreign charters. An extract from the opinion of Lord Cottonham illustrates the point decided.

> "An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. What the law of Scotland may be upon such a subject the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire. The fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in case of bequests within the statute of mortmain. A charity legacy void in this country under the statute of mortmain is good and payable here if for a charity in Scotland."

Fordyce *vs.* Bridges, 2 Phillips, 497.

The same view is also adopted by the text-books on the subject of Wills, Corporations, and Conflict of Laws:

> "If, therefore, a will has all the forms and requisites to pass title to personalty according to the laws of the domicile of the testator, the validity of particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purpose indicated by the testator. Hence, if a bequest is made to a foreign corporation for charitable purposes of personal property

situated within the State of the domicile of the testator, and bequest will be valid, provided the foreign corporation, under its governing statute, is capable of taking such a bequest for such a purpose."

Thompson on Corporations, vol. 5, sec. 5829 (1894).

"Where the personal property is situated in the jurisdiction of the testator's domicile and the testament directs that the proceeds be transmitted to another jurisdiction and there applied to a trust, the courts of the testator's domicile often give effect to such a testament when the trust is lawful by the law of the jurisdiction where it is to be performed, though it could not be enforced in the jurisdiction of testator's domicile."

Page on Wills, sec. 35 (1901).

In his work on Conflict of Laws (1901) Mr. Raleigh C. Minor, commenting on the *substantial* validity of a will, says:

"Though the older rule was that the letter of the lex domicilii should govern in all cases, even though the property disposed of was, under the will, to be enjoyed in another State, the modern tendency is distinctly in the direction of enforcing the policy rather than the letter of the lex domicilii, and if the property is to have its final situs in another State, to make the law of that State a part of the lex domicilii for the purpose of regulating that disposition."

Minor on the Conflict of Laws (1901), p. 337.

The whole subject has been summed up by Wharton in his Conflict of Laws (3d ed., published in 1905). In the chapter on Wills, under the title of "Essential Validity of Particular Provision" (vol. 2, p. 1318 et. seq.), he says:

"591*a*. Generally.—The general principle that refers a will of personal property to the law of the testator's last domicile applies, without qualifica-

tion or exception—other than such as may be made by local statute or the public policy of the forum—to the *general capacity* of the testator to make a will and to the *formal validity* of the will. It does not, however, have an invariable and unqualified applicability to questions relating to the essential validity of particular provisions of a will disposing of personal property" (p. 1318).

"If its purpose is to regulate the accumulation and holding of property, it does not ordinarily apply when the legatee is domiciled in, and the fund is to be remitted to, a foreign country" (p. 1319).

"591*b*. Perpetuities; charitable bequests; mortmain acts; limitation of time and amount of bequests; 'spendthrift' trust.—The purpose of the rule against perpetuities, and of statutes restraining the suspension of the power of alienation or absolute ownership of property, *is not primarily to limit the testator's testamentary capacity*, but to prevent the indefinite withdrawal of property from the channels of commerce; and that purpose is local, and limited to property that is within the jurisdiction and is to remain therein, or at least may remain therein comformably to the will. Hence, the validity of a devise of real property, as affected by the rule against perpetuities, or the suspension of the power of alienation is to be determined by the law of the place where the property is situated, and not by the law of the testator's domicile. When, however, there is an equitable conversion by the will, of the real property into personalty, it is to be treated as personalty for the purposes in question" (p. 1321).

"Thus, a gift in trust of personal property, or of real property equitably converted into personalty, to a charity in a foreign country where the trust is to be administered, and by the law of which it is valid, will not be held invalid even by the courts of the testator's domicile, though it contravene the law of that domicile against perpetuities or the suspension of the absolute ownership of personal property. While a court of the testator's domicile

will not administer such a foreign charity, it will so far lend its aid to the enforcement of the same as to direct the property which is the subject of the gift to be remitted to the foreign state or country for the purposes of the charity, notwithstanding that the bequest would contravene the law of the domicile" (pp. 1322–1323).

"Upon the same principles that apply to a bequest of personal property attacked as a perpetuity, a charitable bequest of personal property may be upheld if valid according to the law of the place where the trust is to administered, though it would be invalid according to the law of the testator's domicile because of indefiniteness of objects or beneficiaries, or because the purpose designated is not the subject of a valid charitable bequest" (pp. 1325–1326).

"The policy of mortmain acts generally is the protection of the people of the sovereignty by which they are enacted against the accumulation of property in perpetuity by ecclesiastical or other corporations, and does not apply to gifts, by residents, of personal property to foreign corporations" (p. 1327).

Wharton on the Conflict of Laws (3d ed., 1905), vol. 2, pp. 1318–1327.

Under this head, the appellant, on his brief in the court below, cited a number of cases, which, it was claimed, are in opposition to the doctrine set out herein. These cases are either not in point or can easily be differentiated.

The facts and decision in the case of Parkhurst *vs.* Roy, 7 Ontario App., p. 614, are as follows:

A testator domiciled in Ontario directed his executors to pay and deliver the residue of his estate to the government and legislature of the State of Vermont to be disposed as to them should seem best, having regard to certain recommendations set forth in the will.

> Held that the State was sufficiently designated as the legatee to entitle it to take the bequest, and the fact that the bequest was for the benefit of and to take effect in a foreign country could not be urged as an objection to its validity. . . . Held, also, that the direction for accumulation did not render the bequest invalid, it being for the courts of Vermont to say whether the direction should be carried out.
>
> (1882) Parkhurst *vs.* Roy, 7 Ontario App., p. 614.

In the case of Fellows *vs.* Miner, 119 Mass., 541, the question involved was as to whether the trust fund (bequeathed by a resident of Massachusetts) could be held by the court a reasonable time within which the State of New York could pass a law enabling the beneficiary, the town of Kinderhook, to take the bequest. The court said:

> "If the legislature of New York shall see fit to provide by supplemental statute for the administration of the trust according to the will, the fund may then be ordered to be paid to the town of Kinderhook. If there shall be no such legislation within a reasonable time, it will become necessary to consider whether the court should appoint another trustee or whether the bequest must fail."
>
> (1876) Fellows *vs.* Miner, 119 Mass., 541, 546.

The case of Sohier *vs.* Burr, 127 Mass., 221, was on a similar point. There was no trustee capable of receiving the bequest made by a resident of Massachusetts for poor meritorious widows living in a Connecticut town. The court said:

> "Five years afterwards the then judge of probate, upon the filing of a certified copy of the will, appointed an almoner under the provisions in question. In the following year the legislature of

> Connecticut confirmed the appointment and gave express power to the judge of probate in the premises. Held, that the charitable bequest was valid, and had not been defeated by the delay in the appointment of an almoner."
>
> (1879) Sohier *vs.* Burr, 127 Mass., 221.

In the case of Sewall *vs.* Wilmer, 132 Mass., 131, the court said:

> "In the case at bar the instrument executed by Mrs. Wilmer being sufficient under the law of Massachusetts, and therefore a good execution of a power, it is unnecessary to consider whether if it had been sufficient by the law of Maryland and insufficient by the law of Massachusetts, it would have been an equally good execution. And all the real estate concerning which the plaintiffs ask for the instructions of the court being in Massachusetts, it becomes also unnecessary to consider how far, had it been situated elsewhere, the lex domicilii should yield to the lexi rei sitæ.
>
> "The result is that in the opinion of a majority of the court the power of appointment has been well executed."
>
> (1882) Sewall *vs.* Wilmer, 132 Mass., 131, 138.

In the case of Ford *vs.* Ford, 70 Wisconsin, 19, a will directed the conversion of the testator's personal property and of his lands in Wisconsin, Michigan and Kansas, into rentable property in Kansas City, the court held as follows:

> "If a testator was, at the time of his death, domiciled in this State (Wis.), yet if he devises land in another State or directs the conversion of any of his property into such land, the validity of any suspension of the absolute power of alienation thereof is to be determined by the courts of the State in which such land is situated; and so of the legality of accumulation of rents and profits therefrom."
>
> (1887) Ford *vs.* Ford, 70 Wis., 19, 22.

Of the case of Handley *vs.* Palmer, 91 Fed. Rep., 948 and 103 Fed. Rep., 39, Wharton in his Conflict of Laws, says:

> "The value of this case as a precedent is greatly weakened."
>
> 2 Wharton on the Conflict of Laws (3d ed.), p. 1326, note.

See, also—

> "Subject Notes" in Mount *vs.* Tuttle, 2 Law Rep. An. (N. S.), p. 438, note.

In discussing the cases cited under this head as applicable to the case at bar, it is pertinent to ascertain what the law in force in the District of Columbia is as affecting perpetuities of personal property.

The Code of Law for the District of Columbia went into operation on January 1, 1902, and at that time the following general provisions were contained therein:

> "Chapter LIX. WILLS. Sec. 1624. PERPETUITIES.—No will, testament, or codicil shall be effectual to create any interest in perpetuity, or make any limitation, or appoint any uses, except as permitted by this Code."

The provision is substantially the same as the law which had existed in the District of Columbia, and which had been inherited in that form from Maryland (see Abert's Compiled Statutes, sec. 2, chap. 70). This section (1624) was REPEALED by an act amending the Code, approved June 30, 1902, thus leaving the provisions of the Code dealing with the subject of "Wills" without any provision as regards perpetuities. By that act there was added a proviso at the end of the subchapter of the Code dealing with "Estates," so that at the time of the

death of the testator the provisions of the Code, so far as they relate to perpetuities, generally read as follows:

> "Chapter XXIV, Subchapter I—ESTATES:
>
> "Sec. 1011. WHAT ESTATES IN DISTRICT.—Estates in land in the District shall be estates of inheritance, estates for life, estates for years, estates at will, and estates by sufferance."
>
> "Sec. 1023. PERPETUITIES.—Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being, by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."
>
> "Sec. 1024. CHATTELS REAL.—The provisions as to future estates shall apply to limitations of chattels real as well as to freehold estates, so that the absolute ownership for a term of years and power to dispose of the same shall not be suspended for a longer period than the absolute power of alienation in respect to a fee simple."
>
> "All the provisions of this subchapter shall apply to personal property generally except where from the nature of the property they are inapplicable" (Amendment, Act of June 30, 1902.)

The section prohibiting perpetuities has been taken away from those provisions of the Code dealing with *wills* generally, and the proviso added to the subchapter dealing with *estates* in the District of Columbia, seeking to make that subchapter apply equally to personal property as to real property. And while it is contended that whatever the peculiar wording of the statute of mortmain in the District of Columbia may be,

it must be construed in its application to personalty as applying only to the District of Columbia, still in the case at bar there is no necessity for construction, as the law in its terms is expressly limited to the District. This makes the cases cited in this section of the brief bear with all the more force on the case at bar, because in those cases the courts read into the statutes by construction the limitation which clearly appears in plain terms in the statutes of the District of Columbia.

While both the opinions below in the case at bar expressly decide the case as being within the rule laid down in Christian Union *vs.* Yount, supra., yet both the courts below also substantially adopt this view of the case:

> "But the position of the appellee is, we think, much stronger, for we have treated the property devised by the first clause of the will as real property. It appears that the will expressly directs that the real estate shall be sold upon the death of the life tenants, and perhaps sooner. The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personalty from the death of the testator (Hope *vs.* Brewer,136 N. Y., 126, 18 L. R. A., 458, 32 N. E., 558; Reiff *vs.* Strite, 54 Md., 298). The real estate being once converted into personalty, it matters even less than in the case of real estate, to the District of Columbia, whether such property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses."
>
> Iglehart *vs.* Iglehart, 26 App. D. C., 209, 217.

> "So far as the real estate itself is concerned, the trusts can by no means infringe the rule against perpetuities, because the will expressly directs that the land shall be sold upon the death of the life tenant, at all events, and perhaps sooner, thus bringing the devise within a life or

lives in being and twenty-one years thereafter. And, so far as the converted proceeds to be held and invested by this New York corporation are concerned, the District of Columbia manifestly can not be at all interested in the question of whether or not a perpetuity is created. While every State is vitally interested in the holdings of real estate within its limits, it is not in legal contemplation a matter of concern to any State whether personal property should accumulate in the hands of corporations in any other State. It is for such other State to make such regulations in that connection as it sees fit; and in the present case the State of New York has passed a law permitting its cemetery corporations to take and hold trusts for keeping cemetery lots in perpetual order and condition.

"I have cited in my opinion here numerous authorities, including: Thompson on Corporations, vol. V, sec. 5829, 1894 edition; Van Sant *vs.* Roberts, 3 Maryland, 119; Brown *vs.* Tompkins, 49 Maryland, 423; Church Extension *vs.* Smith, 56 Maryland, 362, 389; Stickney Will Case, 85 Maryland, 79, 106."

Opinion of Mr. Justice Anderson, in Iglehart *vs.* Iglehart, Equity No. 24,938, Supreme Court, District of Columbia (Rec., p. 16).

IV.

A General Code is One System of Law and Sections Dealing With the Same Subject are Construed as One Statute.

It was insisted by the appellants below that the section of the Code of Law for the District of Columbia (sec. 669) authorizing cemetery associations incorporated under the Code to take similar bequests to the ones under discussion can have no bearing on the case at bar, for the reason that this section is in conflict with section 1023 which interdicts perpetuities; that therefore these

two sections can not stand together, and the one last in order of arrangement must prevail. This contention has been decided by many of the courts to be without merit. The point has been expressly decided in the District of Columbia.

> "It would seem to be well settled that a code, or body of revised laws, should be regarded as a system of contemporaneous acts, as established *uno flatu;* or as a simultaneous expression of the law maker. Its various sections relating to the same subject should, if practicable, be construed together as one; as one act or chapter, or as continuous sections of the same act; and one chapter is to be read with another, relating to the same subject, as one body of law, though collected from independent laws of previous enactment, originally passed at different times and re-enacted by a revisory act. If possible, the various portions of such code or revision must be construed as to harmonize with one another. Its general system of legislation upon the subject-matter should be taken into view, and any particular article construed in conformity therewith, unless an intention to depart from it be clearly shown, and definitions contained in it are to be construed with reference to its positive enactments *in pari materia.*"
>
> Groff *vs.* Miller, 20 App. D. C., 353, 357.

See, also—

Petri *vs.* Commercial Bank, 142 U. S., 644, 650.
Bernier *vs.* Bernier, 147 U. S., 242.

The above cases, and many others that could be cited, support the view that section 669 of the Code of Law for the District of Columbia, conferring on cemetery associations power to accept trusts of real and personal property, must be read in connection with, and regarded as an exception to, section 1023 prohibiting perpetuities, except for charities.

V.

The Will is Clear as to the Intention to Create a Trust Fund.

It was argued below that the clauses conveying the property in trust to the cemetery were invalid, because they were only bequests of the income from the fund, and not the fund itself. It is contended on behalf of the cemetery that the intention of the testatrix to convey the fund itself as a trust fund is clear and explicit.

> "But the intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived and is not contrary to some positive rule of law it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."
>
> Finlay *vs.* King's Lessee, 3 Pet., 346.
> Earnshaw *vs.* Daly, 1 App. D. C., 218.
> DeVaughn *vs.* DeVaughn, 3 App. D. C., 50.
> Holcomb *vs.* Wright, 5 App. D. C., 76.
> Bradford *vs.* Matthews, 9 App. D. C., 438.

See, also, to the same effect:

Hardenburgh *vs.* Ray, 151 U. S., 112, 126.
Smith *vs.* Bell, 6 Pet., 68, 75.
Colton *vs.* Colton, 127 U. S., 300.
Slingluff *vs.* Johns, 87 Md., 273.

The bequest of the interest or produce of a fund without limitation as to the extent of its duration is a bequest of the fund itself.

Garrett *vs.* Rex, 6 Watts, 14.
Appeal of Pa. Co. for Ins. on Lives, 83 Pa., 312.
Collier *vs.* Collier, 3 Ohio St., 369.
Millard's Appeal, 87 Pa., 457.
Craft *vs.* Snook, 13 N. J. Eq., 121.
Gulick *vs.* Gulick's Ex., 27 N. J. Eq., 498.
Snyder *vs.* Baker, 5 Mackey, 443.
Roper on Legacies, vol. 2, p. 1476.

VI.

There is a Beneficiary Capable of Enforcing the Trust.

Much stress was laid by counsel for the heirs at law in the argument below on the proposition that the trust in this case must fail, and a resulting trust arise in favor of the heirs at law, because there was no beneficiary capable of enforcing it. It was pointed out that there is no provision in the New York law authorizing the Greenwood Cemetery to accept such trusts, such as is contained in the latter part of section 669 of the Code of the District of Columbia. This section provides that the Supreme Court of the District of Columbia shall have full power to compel the due performance of such trusts upon a bill filed by the proprietor of any lot in such cemetery.

It is admitted, of course, that a trust will always fail, and a resulting trust arise, where there is no beneficiary.

While it may be doubted whether in the absence of legislation the proprietor of any lot in the Greenwood Cemetery would have a standing in court to enforce this trust, it is certain that the proprietor of the Andrews' cemetery lot would have this power.

Even if the lot in question belonged absolutely and solely to the cemetery, the cemetery is then the beneficiary under the trust, and that it is both trustee and beneficiary is no objection. Such trusts are of everyday occurrence.

The purpose of the provision of the District Code referred to is clearly to make the proprietor of any lot a beneficiary under such trusts. The general powers of courts of equity to enforce trusts would give the right to the proprietor of the lot for the care of which the trust was created.

The appellants further contend that the Greenwood Cemetery has no power under its charter to act as trustee

in the District of Columbia for property located herein, and has not power to convert the real estate into personalty.

If there is any force in this contention, equity will intervene and appoint a trustee to carry into effect the provisions of the will in this respect. For equity will never allow a trust to fail for want of a trustee.

VII.

The Bequest in Clause Ten is Valid.

As to clause ten (by which $5,000 is directed to be raised out of the estate for the purpose of erecting a monument at the grave of testatrix's husband) the heirs at law contended below that this was void for uncertainty and unreasonableness. The amount is fixed, and the purpose of the testatrix is clear to leave the details with her executor. It would be difficult to do more than provide for "a suitable monument," unless an exact description were given in the will. It is not an unreasonable provision. The testatrix had no children and the amount for the purpose is not excessive. Even if it were, as the learned judge below in his opinion says:

> "The testatrix was at perfect liberty—whether reasonable or unreasonable from the standpoint of other people at least—in disposing of her estate, and unless mentally incompetent the disposition must be upheld. No attempt whatever has been made to raise any question here as to mental competency."
>
> Iglehart *vs.* Iglehart, Rec., p. 15.

It is respectfully submitted that the decree of the court below should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1906.

HENRY F. IGLEHART and MARY I. POLK
vs.
J. HOWARD IGLEHART, Executor, etc. } No. 158.

The facts in this case are stated in the brief to which this is attached, and also in the brief of the appellants.

This bill having been filed by the appellee as executor by reason of the fact that he could not safely administer the estate in the face of conflicting claims, without a construction of the will by a court of general jurisdiction, he made the legatees, devisees, and heirs at law parties to enable them to interplead.

He is interested in his individual interest with the appellants, but deeming his duty as the trusted executor of the deceased superior, he considered that duty should be held superior to any personal interest, and the equity court below having sustained the will, he submitted to that decision, but the appellants having taken an appeal to the Court of Appeals, he again submitted to the decree of that court. The appellants having by permission of the court obtained a severance and prosecuted their appeal to this court, he feels that it is but right and proper that he should leave the questions involved to be argued by those interested, and on his part agrees that the Greenwood Cemetery Company should, by its counsel, represent the appellee in the argument of the law and facts so far as its interests are involved, but that the appellee and the estate should be protected in the costs involved by the contention between the defendants, and asking to be protected in costs, he respectfully submits this cause to the court without argument and submits to any decree that this court may deem right.

CHAS. H. STANLEY,
Attorney for J. Howard Iglehart,
Executor, Appellee.